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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

VALOY S. WOODS,
Plaintiff,

v.

MICHAEL J. ASTRUE,
Commissioner of Social Security,
Defendant.

No. CV 08-0579-PHX-MHM

ORDER

Plaintiff Valoy S. Woods (“Plaintiff”) seeks judicial review of the Administrative Law Judge’s decision to deny Plaintiff’s claim for disability insurance benefits pursuant to § 205(g) of the Social Security Act (“Act”), 42 U.S.C. § 405(g). Currently pending before the Court are Plaintiff’s Motion for Summary Judgment (Dkt. #11) and Defendant Michael Astrue’s (“Defendant”) Cross-Motion to Remand and in Opposition to Plaintiff’s Motion for Summary Judgment (Dkt. #21).

I. PROCEDURAL HISTORY

Plaintiff filed an application for Disability Insurance Benefits (DIB) under Title II of the Social Security Act, 42 U.S.C. § 401 et seq. on January 23, 2004 (Administrative Record (“AR”) 67-69) and for Supplemental Security Income (SSI) on June 8, 2004. (AR 578-80). Plaintiff alleged an onset date of disability of October 31, 2003 based on physical and mental impairments including fibromyalgia, spasmodic dysphonia

1 neurological voice disorder, fatigue, knee pain, and depression. On June 20, 2006, a
2 hearing was held before Administrative Law Judge (“ALJ”) Joan G. Knight (AR 591-
3 636). The ALJ issued an unfavorable notice of decision on December 26, 2006. (AR 29-
4 39). The ALJ denied Plaintiff's application for a period of disability and disability
5 insurance benefits under sections 216(I) and 223(d) of the Social Security Act. (AR 17-
6 23). The Appeals Council denied Plaintiff's request for review and adopted the ALJ's
7 decision as the Defendant's final decision on February 19, 2008 (AR 11-13).

8 Plaintiff initiated this action on March 26, 2008. Plaintiff seeks judicial review of
9 the ALJ's decision pursuant to 42 U.S.C. §§ 405(g). (Dkt. #11). After consideration of
10 the pleadings, the record, and the applicable law, the Court issues the following order.

11 **II. BACKGROUND**

12 **A. Plaintiff's Medical History**

13 Plaintiff has not worked since October 31, 2003 (AR 37, 67), the date that she
14 alleges she became disabled. (AR 67). Plaintiff suffers from spasmodic dysphonia,
15 fibromyalgia, and mental impairments. (AR 193, 535, 534, 530, 526, 525). Plaintiff's
16 medications have included Wellbutrin, BuSpar, Zanax p.r.n., and Motrin. (AR 192).

17 Dr. Thad E. Bartell treated Plaintiff between January 15, 2004 and August 4, 2005
18 for her vocal problems (AR 242-55). On February 3, 2004 Dr. Bartell confirmed a
19 diagnosis of spasmodic dysphonia via results obtained after a videolaryngoscopy was
20 performed. (AR 250). Plaintiff was treated with Botox injections, the only known
21 treatment for the condition (Id.).

22 Dr. Lucinda Michel treated Plaintiff between January 8, 2004 (AR 275) and
23 around August 30, 2004 (AR 256) at the Mesa Family Medical Center after Plaintiff
24 sought treatment there for depression and anxiety. (AR 298). Dr. Michel found that
25 Plaintiff's pain is at the moderately severe level and that it seriously affected her ability to
26 function. (AR 427, 419). Dr. Michel diagnosed Plaintiff with fibromyalgia (AR 535,
27 534, 530, 526, 525), vocal cord dysfunction (AR 265, 264, 261, 258, 257, 539, 538, 537,
28 536, 535, 534, 533, 532, 531, 530, 526, 525, 523), back pain or strain (AR 265, 264, 261,

1 258, 257, 539, 538, 537, 536, 533, 532, 531, 529, 525, 522), and depression/anxiety (AR
2 265, 264, 261, 258, 257, 539, 538, 537, 536, 535, 534, 533, 532, 531, 530, 529, 526, 522,
3 523).

4 Plaintiff was also treated for mental impairments by psychiatric nurse practitioner,
5 Mary Cordell, beginning on February 19, 2004 (AR 291-95) through February 15, 2005
6 (AR 516). Dr. Wayne R. General performed a psychological consultive examination on
7 Plaintiff on June 10, 2004 (AR 199-206) and diagnosed her with major affective disorder,
8 reactive to Plaintiff's physical conditions with psychotic features and anxiety disorder
9 (not otherwise specified) (AR 203). Dr. George O'Brien performed a consultive
10 examination on Plaintiff on June 8, 2004 (AR 191-98) and diagnosed her with
11 anxiety/depression syndrome, cervical spinal myofascial disorder, and spastic larynx
12 (AR 198).

13 Dr. Lee Ann Kelly at the Mayo Clinic saw Plaintiff on February 15, 2005
14 (AR 490-93) and diagnosed her with major depression recurrence, generalized anxiety
15 disorder, panic disorder without agoraphobia, phobias. (AR 492). Plaintiff was treated at
16 the Marc Center Behavioral Health Services between April 1, 2005 and June 14, 2006
17 (AR 548-77). At an Annual Psychiatric Update on February 28, 2006, Plaintiff was
18 assessed as "currently stable, operating at baseline." (AR 554). Terry Surma, a nurse
19 practitioner, diagnosed Plaintiff with a mood disorder not otherwise specified on April 25,
20 2005 with a GAF score of 50. (AR 559). At an annual review in February 2006, she
21 diagnosed Plaintiff with a depressive disorder not otherwise specified with a GAF score
22 of 75. (AR 554).

23 On July 7, 2004, Dr. Hughes conducted a Physical Residual Functional Capacity
24 Assessment at the request of the Agency. (AR 215-22). He concluded Plaintiff could
25 occasionally lift and carry 50 pounds, frequently lift 25 pounds, stand and/or walk for six
26 hours, sit for six hours, and could occasionally climb ladders/ropes/scaffolds (AR 216-
27 17), and that she was probably unable to do steady phone work. (AR 219).

28 Wayne Winn, M.D., completed a Psychiatric Review Technique on July 9, 2004. (AR

1 223-36). Dr. Winn concluded that Plaintiff had moderate restriction of activities of daily
2 living; moderate difficulties in maintaining social functioning; and mild difficulties
3 On July 7, 2004, Dr. Hughes conducted a Physical Residual Functional Capacity
4 Assessment at the request of the Agency. (AR 215-22). He concluded Plaintiff could
5 occasionally lift and carry 50 pounds, frequently lift 25 pounds, stand and/or walk for six
6 hours, sit for six hours, and could occasionally climb ladders/ropes/scaffolds (AR 216-
7 17), and that she was probably unable to do steady phone work. (AR 219).

8 Dr. Wayne Winn completed a Psychiatric Review Technique on July 9, 2004. (AR
9 223-36). Dr. Winn concluded that Plaintiff had moderate restriction of activities of daily
10 living; moderate difficulties in maintaining social functioning; and mild difficulties in
11 maintaining concentration, persistence, or pace. (AR 233).

12 **B. Hearing Testimony**

13 On June 20, 2006, the ALJ conducted a hearing on Plaintiff's application for
14 disability benefits. (AR 29, 594). Plaintiff and Sandra Richter, a vocational expert,
15 testified during the hearing. (AR 593).

16 Plaintiff testified that she has two children, ages 18 and 20, and that custody battles
17 with their father had contributed to her depression. (AR 605). Plaintiff had a valid
18 driver's license, but she rarely drove because she did not own a vehicle and her hand went
19 numb and became painful. (AR 606). Plaintiff was first diagnosed with spasmodic
20 dysphonia, which caused her to have a "breathy" and "whispery" voice, in May 2003.
21 (AR 607). Plaintiff stated that fibromyalgia caused pain in most of her muscles, neck,
22 lower back, legs and arms. (AR 611). Plaintiff stated she experienced migraine
23 headaches three-four times per month. (AR 612). Plaintiff suffered whiplash in two
24 separate accidents in October 2000 and April 2001. (AR 617). Plaintiff has experienced
25 depression since 1980. (AR 618). Plaintiff stated she read, watched television, and used a
26 computer. (AR 620-21). She borrowed a car when she needed to grocery shop. (AR 621).
27 Plaintiff stated she could sit one hour and walk five to ten minutes because her knees
28 ached. (AR 621-22). She stated she could stand for one-half hour and could lift and carry

1 about ten to fifteen pounds. (AR 622). Plaintiff stated she experienced anxiety around
2 people. (AR 624).

3 Sandra Richter, a vocational expert, testified during the hearing that Plaintiff's
4 residual functional capacity (RFC) precluded her from performing her previous work.
5 (AR 629). The VE further testified that, based on the hypothetical presented by the ALJ
6 of an individual with Plaintiff's educational and vocational background, who could
7 perform work at the light exertion level with restrictions to occasionally climbing ladders,
8 ropes or scaffolds, kneeling, crouching, and crawling, and with limited vocal volume,
9 Plaintiff could perform sedentary unskilled work as a cashier and as a light unskilled
10 parking lot attendant of which there were significant numbers available in Arizona and
11 the national economy. (AR 626-32). Plaintiff's attorney added the specific definitions
12 and limitations assessed by Dr. General as part of the psychological consultative
13 examination to the ALJ's hypothetical, at which time the vocational expert testified that
14 those limitations "would preclude work." (AR 634).

15 **C. ALJ's Conclusion**

16 On December 26, 2006, the ALJ denied Plaintiff's claim for disability insurance
17 benefits. (AR 39). The ALJ found that Plaintiff was not disabled as defined under the
18 Social Security Act, at any time through the date of the decision. (Id.). The ALJ's
19 decision was based on the June 20, 2006 hearing, and the requisite five-step sequential
20 evaluation for determining whether an applicant is disabled under the Social Security Act.
21 See 20 CFR §§ 404.1520 and 416.920. (AR 29-40).

22 At step one, the ALJ found that Plaintiff had not engaged in any substantial gainful
23 activity since October 31, 2003, the alleged onset date. (AR 30). At step two, the ALJ
24 found that Plaintiff had the severe impairments of spasmodic dysphonia of the larynx,
25 fibromyalgia, bilateral carpal tunnel syndrome-newer onset mild, obesity, migraine
26 headaches, moderate degenerative disc diseasecervical, mood disorder not otherwise
27 specified, panic disorder/social phobia and mild osteoarthritis right knee. (Id.). At step
28 three, the ALJ found that the severity of the Plaintiff's impairments, considered singly or

1 in combination, does not medically meet or equal the criteria for any listed impairments
2 of 20 C.F.R. Part 404, Subpart P, App. 2. (Id.).

3 Before considering step four of the sequential evaluation process, the ALJ
4 determined that Plaintiff retains the residual functional capacity (“RFC”) to perform a
5 reduced range of light exertional unskilled work. Specifically, the ALJ found that Plaintiff
6 could: lift 25 pounds occasionally and ten pounds frequently; stand for one hour at a time
7 and two hours in an eight-hour day; walk for one hour at a time and three hours in an
8 eight-hour day; and sit for a total of one hour at a time and three hours in an eight-hour
9 day. (AR 38). The ALJ further found that Plaintiff had limited ability to engage in fine
10 manipulation with her bilateral hands; that she could engage in only occasional bending,
11 stooping, and reaching; that she was precluded from squatting, climbing and crawling;
12 that she must avoid any exposure to unprotected heights, marked changes in
13 humidity/temperature, fumes and odors; and that she could have only mild exposure to
14 moving machinery and driving automotive equipment. (Id.).

15 At step four, the ALJ found that Plaintiff is unable to perform her past relevant
16 work, that she was a younger individual, that she had a high school education, and that
17 she had no skills that would transfer to jobs within her RFC. (Id.). At step five, the ALJ
18 found that an individual with Plaintiff’s characteristics and RFC could perform sedentary
19 unskilled work as a cashier (with a sit/stand option and limited to frequent fingering/
20 keyboarding), of which there were significant numbers available in Arizona and the
21 national economy. (AR 38-39).

22 Accordingly, the ALJ concluded that Plaintiff was not under a “disability” as
23 defined in the Social Security Act at any time period relevant to her application. (AR 39).

24 **III. STANDARD OF REVIEW**

25 In order to qualify for disability insurance benefits, an applicant must establish that
26 he is unable to engage in substantial gainful activity due to a medically determinable
27 physical or mental impairment that has lasted or can be expected to last for a continuous
28 period of not less than 12 months. See 42 U.S.C. § 1382c (a)(3)(A). In addition, an

1 applicant must show that his physical or mental impairment is of such severity that he is
2 not only unable to do his previous work, but cannot, considering his age, education, and
3 work experience, engage in any other kind of substantial gainful work that exists in the
4 national economy. Quang Van Han v. Bowen, 882 F.2d 1453, 1456 (9th Cir. 1989).

5 To determine whether an applicant is eligible for disability benefits, the ALJ
6 conducts the following five-step sequential analysis:

- 7 (1) determine whether the applicant is currently employed in substantial
gainful activity;
- 8 (2) determine whether the applicant has a medically severe impairment
or combination of impairments;
- 9 (3) determine whether the applicant's impairment equals one of a
10 number of listed impairments that the Commissioner acknowledges
as so severe as to preclude the applicant from engaging in substantial
gainful activity;
- 11 (4) if the applicant's impairment does not equal one of the listed
impairments, determine whether the applicant is capable of
12 performing his or her past relevant work;
- 13 (5) if not, determine whether the applicant is able to perform other work
that exists in substantial numbers in the national economy.

14 20 CFR §§ 404.1520, 416.920; see also Bowen v. Yuckert, 482 U.S. 137, 140-41 (1987).

15 The Court must affirm an ALJ's findings of fact if they are supported by
16 substantial evidence and free from reversible legal error. See 42 U.S.C. 405(g); see also
17 Marcia v. Sullivan, 900 F.2d 172, 174 (9th Cir. 1990). Substantial evidence means "more
18 than a mere scintilla," but less than a preponderance, i.e., "such relevant evidence as a
19 reasonable mind might accept as adequate to support a conclusion." See, e.g., Richardson
20 v. Perales, 402 U.S. 389, 401 (1971); Sorenson v. Weinberger, 514 F.2d 1112, 1119 n. 10
21 (9th Cir. 1975); Clem v. Sullivan, 894 F.2d 328, 330 (9th Cir. 1990).

22 To determine whether substantial evidence supports a decision, the Court must
23 consider the record as a whole and weigh both the evidence that supports and detracts
24 from the ALJ's conclusion. See Richardson, 402 U.S. at 401; see also Tylitzki v. Shalala,
25 999 F.2d 1411, 1413 (9th Cir. 1993). However, "[i]t is for the ALJ, not the courts, to
26 resolve ambiguities and conflicts in the medical testimony and evidence." Andrews v.
27 Shalala, 53 F.3d 1035, 1039 (9th Cir. 1995) (citations and quotations omitted). The ALJ
28 may draw inferences logically flowing from the evidence, and "[w]here evidence is

1 susceptible to more than one rational interpretation, it is the ALJ's conclusion which must
2 be upheld." Id. (citation omitted). Nevertheless, "[i]f there is medical evidence
3 establishing an objective basis for some degree of pain and related symptoms, and no
4 evidence affirmatively suggesting that the claimant was malingering, the [ALJ's] reason
5 for rejecting the claimant's testimony must be "clear and convincing" and supported by
6 specific findings." Dodrill v. Shalala, 12 F.3d 915, 917 (9th Cir. 1993) (quotations
7 omitted). And "[w]hen an ALJ's reasons for rejecting the claimant's testimony are
8 legally insufficient and it is clear from the record that the ALJ would be required to
9 determine the claimant is disabled if he had credited the claimant's testimony, [the court
10 must] remand for a calculation of benefits." Orn v. Astrue, 495 F.3d 625, 640 (9th Cir.
11 2007) (quotation omitted). Regardless, "[i]f the evidence can support either affirming or
12 reversing the ALJ's conclusion, [then the Court] may not substitute [its] judgment for that
13 of the ALJ." Robbins v. Social Sec. Admin., 466 F.3d 880, 882 (9th Cir. 2006).

14 **IV. DISCUSSION**

15 Plaintiff contends that the ALJ erred by: (1) selectively relying on and rejecting the
16 assessments of the treating physician, Dr. Michel; (2) selectively relying on and rejecting
17 the assessment of the examining psychologist, Dr. General, and by according "substantial
18 weight" to the assessment of mental capacities by a nonexamining state agency
19 consultant; (3) rejecting Plaintiff's symptom testimony in the absence of clear and
20 convincing reasons for doing so; (4) limiting an assessment of Plaintiff's mental residual
21 functional capacity to the ability to perform "unskilled work." (Dkt. #14). Plaintiff asks
22 the Court to remand the case for award of benefits. (Dkt. #14). Defendant asks that the
23 Court instead remand this case for further administrative proceedings, asserting that
24 remand is necessary to allow the ALJ to correct inconsistencies in the final decision.
25 (Dkt. #21).

26 **A. Rejection of Plaintiff's Credibility**

27 Plaintiff contends that the ALJ committed error in rejecting her testimony in the
28 absence of clear and convincing reasons for doing so.

1 When making a credibility determination, “[a]n ALJ is not required to believe
2 every allegation of disabling pain or other non-exertional impairment.” Orn, 495 F.3d at
3 635. However, if the medical evidence establishes an objective basis for some degree of
4 pain and related symptoms, and there is no evidence affirmatively suggesting that the
5 claimant was malingering, then the ALJ’s reason for rejecting Plaintiff’s testimony must
6 be clear and convincing and supported by specific findings. See Social Security Ruling
7 96-7 (stating that adverse credibility determinations must be sufficiently specific to make
8 clear to any subsequent reviewers the weight the adjudicator gave to the individual’s
9 statements and the reasons for that weight)¹; Dodrill, 12 F.3d at 918 (9th Cir. 1993).
10 General findings are insufficient, rather the ALJ must identify what evidence is not
11 credible and what evidence undermines Plaintiff’s complaints. Id.

12 The adjudicator may not reject Plaintiff’s subjective complaints based solely on a
13 lack of objective medical evidence, which fully corroborates the alleged severity of pain.
14 See Rollins v. Massanari, 261 F.3d 853, 856 (9th Cir. 2001); Bunnell v. Sullivan, 947
15 F.2d 341, 346 (9th Cir. 1991); Cotton v. Bowen, 799 F.2d 1403, 1407 (9th Cir. 1986);
16 Social Security Ruling 88-13. Furthermore, the ALJ may not discredit Plaintiff’s
17 testimony as to the *severity* of his symptoms merely because they are unsupported by the
18 objective medical evidence because Plaintiff demonstrated through medical evidence that
19 his underlying impairment could reasonably be expected to produce the symptoms
20 alleged. Lingenfelter, 504 F.3d at 1036.

21 In the instant case, the ALJ, in rejecting Plaintiff’s credibility, stated that
22 Plaintiff’s “allegations of chronic pain and fatigue from fibromyalgia . . . are not fully

23
24 ¹ Social Security Rulings constitute the Social Security Administration’s
25 interpretations of the statute it administers and of its own regulations. Chavez v.
26 Dep’t of Health & Human Servs., 103 F.3d 849, 851 (9th Cir. 1996); Quang Van
27 Han v. Bowen, 882 F.2d 1453, 1457 (9th Cir. 1989). Although Social Security
28 Rulings do not have the force of law, Chavez, 103 F.3d at 851, once published,
they are binding upon ALJs and the Commissioner. Holohan v. Massanari, 246
F.3d 1195, 1202-03 n. 1 (9th Cir. 2001); Gatliff v. Comm’r of Soc. Sec. Admin.,
172 F.3d 690, 692 (9th Cir. 1999).

1 supported in the medical record.” (AR 31). To support her adverse credibility
2 determination that Plaintiff’s “impairments . . . in combination do cause [Plaintiff] some
3 pain and restrictions, but not to the extent alleged[,]” the ALJ pointed to the fact that
4 Plaintiff’s fibromyalgia was not diagnosed by a rheumatologist, that Plaintiff looked for
5 work, and that Plaintiff engaged in some limited activities. (AR 31-33).

6 The ALJ noted that fibromyalgia was diagnosed by Dr. Michel, Plaintiff’s primary
7 care physician, not a rheumatologist. *Id.* While a rheumatologist is the appropriate
8 specialty for fibromyalgia, Benecke v. Barnhart, 379 F.3d 587, 594 n.4 (9th Cir. 2004),
9 the Ninth Circuit recognizes that a treating physician’s specialty is only one factor to be
10 considered when assigning weight to the physician’s opinion. See Benton v. Barnhart,
11 331 F.3d 1030, 1036 n.1 (9th Cir. 2003) (noting “the primacy of his opinion derives from
12 his superior *vantage* compared to a non-treating physician, even apart from any superior
13 *credentials*”) (emphasis in original). The present case is not one where there is a conflict
14 between a treating primary care physician and a relevant specialist; no rheumatologist
15 opined Woods did not suffer from fibromyalgia. Therefore, the lack of a diagnosis by a
16 specialist cannot be used to discredit a treating physician’s diagnosis.

17 The ALJ thought that Plaintiff’s attempt to find work detracted from the veracity
18 of the severity of her symptoms. That Plaintiff hoped to work does not mean that in fact
19 she could sustain work. See Cox v. Califano, 587 F.2d 988, 991 (9th Cir. 1978) (holding a
20 “willingness to try to engage in rehabilitative activity . . . is clearly not probative of a
21 present ability to engage in such activity”).

22 The ALJ relied on the fact that Plaintiff engaged in some limited activities, such as
23 swimming, exercising, clipping coupons, and travel out of state. However, the ALJ did
24 not demonstrate the reported abilities equated with the ability to sustain work on a regular
25 and continuing basis as required by Social Security Ruling 96-8p.² Plaintiff’s attempt to
26 lead a normal life should not be used to penalize Plaintiff. See Reddick, 157, F.3d at 722.

27 ² Assessing Residual Functional Capacity in Initial Claims, Social Security Ruling 96-
28 8p, 1996 SSR LEXIS 5, at *1, available at www.ssa.gov/OP_Home/rulings/di/SSR96-08-di-01.html.

1 Furthermore, Plaintiff's claimed limitations would have bearing on her credibility
2 "[o]nly if the level of activity were inconsistent with [them]." Id. The activities
3 discussed by the ALJ are not inconsistent with the level of pain Plaintiff alleges and thus
4 cannot be used to discredit Plaintiff's testimony.

5 Notably, Defendant does not argue that the ALJ correctly rejected Plaintiff's
6 credibility. To the contrary, Defendant states that the ALJ's assessment of Plaintiff's
7 residual functional capacity (RFC) was "based [on an] erroneous determination" and that
8 the ALJ did not "consider limitations and restrictions imposed by all of [Plaintiff's]
9 impairments." (Dkt. #21).

10 As such, the Court finds that the ALJ did not provide clear and convincing reasons,
11 supported by specific findings, to justify her adverse credibility determination. The Court
12 must credit Plaintiff's evidence as true because the ALJ failed to provide legally
13 sufficient reasons for rejecting Plaintiff's subjective complaints regarding the severity of
14 his symptoms. Benecke, 379 F.3d at 593.

15 **B. Rejection of Treating Physicians' Assessments**

16 Plaintiff contends that the ALJ erred in rejecting the assessments of Plaintiff's
17 treating physicians and in finding that they lacked objective support because they were
18 premised on Plaintiff's subjective complaints.

19 "The opinions of treating doctors should be given more weight than the opinions
20 of doctors who do not treat the claimant." Orn, 495 F.3d at 632 (quoting Reddick, 157
21 F.3d at 725). The ALJ's role is to resolve conflicts and ambiguities in the record. See
22 Howard ex rel Wolff v. Barnhart, 341 F.3d 1006, 1012 (9th Cir. 2003); Edlund v.
23 Massanari, 253 F.3d 1153,1156 (9th Cir. 2001). If a treating doctor's opinion is not
24 contradicted by that of another doctor, an ALJ may only reject the treating doctor's
25 opinion by giving "clear and convincing reasons supported by substantial evidence in the
26 record." Howard ex rel Wolff, 341 F.3d at 1012. And even if the treating doctor's
27 assessment is contradicted by the opinion of another doctor, an ALJ still may not reject it
28

1 without articulating “specific and legitimate reasons supported by substantial evidence in
2 the record.” Id.

3 To meet this burden, the ALJ should provide concrete and detailed summary
4 describing the reasons for rejecting a treating physician’s opinion. Rodriguez v. Bowen,
5 876 F.2d 759, 762 (9th Cir. 1989) (holding that the ALJ erred by not describing in detail
6 the reasoning for rejecting a treating physician’s opinion); Holohan v. Massanari, 246
7 F.3d 1195, 1205 (9th Cir. 2001) (finding that an ALJ committed legal error where the
8 ALJ failed to read a doctor’s statements in context and selectively relied on the doctor’s
9 treatment notes). The Ninth Circuit has consistently rejected ALJ’s findings that are
10 vague or conclusory. “To say that medical opinions are not supported by sufficient
11 objective findings or are contrary to the preponderant conclusions mandated by the
12 objective findings does not achieve the level of specificity our prior cases have required.
13 . . The ALJ must do more than offer his own conclusions. He must set forth his own
14 interpretations and explain why they, rather than the doctors’, are correct.” Embrey v.
15 Bowen, 849 F.2d 418, 421-22 (9th Cir. 1988).

16 In addition, the court in Embrey highlighted the importance of the “subjective
17 judgments of treating physicians” because they “properly play a part in their medical
18 evaluations.” 849 F.2d at 421-22; see Green-Younger v. Barnhart, 355 F.3d 99, 107 (2d
19 Cir. 2003) (noting that a treating physician’s reliance on a claimant’s reported symptoms
20 “hardly undermines his opinions as to her functional limitations, as a patient’s report of
21 complaints, or history, is an essential diagnostic tool”) (internal quotation marks,
22 brackets, and citation omitted); Lester v. Chater, 81 F.3d 821, 832 (9th Cir. 1995) (“The
23 Secretary may not assume that doctors routinely lie in order to help their patients collect
24 disability benefits.”).

25 **1. Treating Physician Michel**

26 In the instant case, the ALJ rejected the opinion of Dr. Michel, stating that “Dr
27 Michel’s evaluations of the claimant, the limited abnormal clinical findings in the medical
28 record, [and] the objective evidence . . . fail to support that the claimant has moderately

1 severe levels of fatigue and pain of such severity that [Plaintiff] would be unable to
2 sustain work on a regular and continuing basis” and that “the progress notes do not
3 document that the claimant complained of fatigue.” (AR 35). “Once the claimant
4 produces medical evidence of an underlying impairment, the Commissioner may not
5 discredit the claimant's testimony as to subjective symptoms merely because they are
6 unsupported by objective evidence.” Lester v. Chater, 81 F.3d at 834. And to reject the
7 claimant's complaints, the ALJ must provide “specific, cogent reasons for the disbelief.”
8 Rashad v. Sullivan, 903 F.2d 1229, 1231 (9th Cir. 1990) .

9 The ALJ found that the medical evidence shows the existence of medically
10 determinable impairments that could reasonably lead to Plaintiff’s symptoms. (AR 31).
11 Thus, the ALJ must cite “specific, cogent reasons for the disbelief” of plaintiff’s
12 testimony. Rashad, 903 F.2d at 1231. Contrary to the ALJ’s belief, Plaintiff’s treating
13 physician’s notes indicate that she complained of fatigue on July 29, 2004 (AR 264) and
14 August 30, 2004 (AR 257) and, consultation notes from the Mayo Clinic state Plaintiff
15 complained of “severe fatigue” or “chronic fatigue.” (AR 368, 369, 378, and 379).
16 Therefore, the reason cited by the ALJ, was incorrect and thus legally insufficient. (AR
17 35).

18 Where the Commissioner fails to provide adequate reasons for rejecting the
19 opinion of a treating or examining physician, the court may credit that opinion “as a
20 matter of law.” Hammock v. Bowen, 879 F.2d 498, 502 (9th Cir. 1989). See also, Pitzer
21 v. Sullivan, 908 F.2d 502, 506 (9th Cir. 1990) (remanding for payment of benefits where
22 Secretary did not provide adequate reasons for disregarding examining physician's
23 opinion). Because the evidence in this case contradicts the ALJ’s reasoning for rejecting
24 the opinion of Dr. Michel, the ALJ’s reason for rejecting Dr. Michel’s opinion was not
25 supported by substantial evidence. Accordingly, the Court finds that the ALJ did not
26 provide the requisite reasons supporting her decision to reject the treating physician’s
27 assessments.

28 **2. Psychologist General**

1 Plaintiff argues that the ALJ improperly rejected the assessment of Dr. General, a
2 psychological consultative evaluator, finding that Dr. General's conclusions to be based
3 on Plaintiff's subjective allegations, and that the ALJ improperly accorded "substantial
4 weight" to the assessment of mental capacities by a non-examining consultant.

5 In Ryan v. Comm'r of Soc. Sec., the court stated that "an ALJ does not provide
6 clear and convincing reasons for rejecting an examining physician's opinion by
7 questioning the credibility of the patient's complaints where the doctor does not discredit
8 those complaints and supports his ultimate opinion with his own observations." 528 F.3d
9 1194, 1199-1200 (9th Cir. 2008). In the present case, Dr. General did not find Plaintiff
10 unbelievable. Therefore the ALJ did not provide clear and convincing reasons for
11 rejecting Dr. General's testimony. Accordingly, the Court finds that the ALJ did not
12 provide the requisite reasons supporting her decision to reject Dr. General's assessments.

13 The ALJ assigned "substantial weight" to the Winn assessment form completed by
14 the nonexamining psychologist, making the conclusory statement that the "medical
15 opinion is compelling as it is supported by the great weight of the evidence of record."
16 (AR 36). The ALJ, however, does not state what this evidence is. The Court must
17 assume that the evidence to which the ALJ was referring is the same evidence that the
18 ALJ used to reject Plaintiff's credibility. As discussed in Part IV.A, this evidence was
19 insufficient to reject Plaintiff's credibility. As such, it cannot be used to assign
20 substantial weight to the Winn assessment form and reject the diagnosis of Dr. General.

21 Aside from the evaluations of the nonexamining physicians, there does not seem to
22 be any evidence that contradicts Dr. General's assessments. "The opinion of a
23 nonexamining physician cannot by itself constitute substantial evidence that justifies the
24 rejection of the opinion of either an examining physician *or* a treating physician." Lester
25 v. Chater, 81 F.3d 821, 831 (9th Cir. 1995) (emphasis in original). Seeing no evidence to
26 justify the adoption of a nonexamining physician's opinion over that of an examining
27 physician, the Court finds that Dr. General's opinion was improperly rejected.

28 **D. Limitation of RFC to "unskilled work."**

1 Plaintiff alleges that the ALJ erred when she limited an assessment of Plaintiff's
2 RFC to the ability to perform unskilled work, stating that the "ALJ decision equated
3 simple work to the [RFC] to perform unskilled work." (Dkt. #14) (internal quotations
4 omitted). Plaintiff also states that once the Court determines that remand of this matter
5 for award of benefits is the proper remedy, remand to correct this error is unnecessary.
6 The Court agrees and does not reach this issue.

7 **E. Inconsistencies in the Final Decision**

8 Defendant argues that summary judgment is not appropriate because a full and fair
9 development of the facts is still needed. (Dkt. #21). As such, Defendant argues that
10 remand for that purpose is the appropriate remedy. (*Id.*) Defendant cites to three
11 questions of fact that, according to Defendant, must be resolved. Specifically, Defendant
12 alleges that the ALJ: (1) disregarded a third-party function report; (2) did not provide
13 specific, legitimate reasons for disregarding contradicted opinion of a treating physician
14 that are based on substantial evidence in the record; and (3) improperly failed to consider
15 some of Plaintiff's impairments. (*Id.*)

16 **1. ALJ's Disregard of an Adult-Third Party Function Report**

17 Defendant states that Plaintiff's roommate completed a Function Report Adult-
18 Third Party on April 19, 2004 and that the ALJ made no mention of the report in her
19 decision. (AR 76-84, Dkt. #21). Plaintiff argues that "[t]he ALJ's apparent rejection of
20 the lay witness testimony, absent germane reasons for rejection supported by specific
21 evidence, is legally insufficient." (Dkt. 21).

22 The Court agrees with Defendant that citing no reason for rejection of testimony is
23 improper. Where the ALJ improperly rejects testimony, the Court "will not remand
24 solely to allow the ALJ to make specific findings regarding that testimony." *Lester v.*
25 *Chater*, 81 F.3d at 834 (internal citation omitted). Therefore remand for a determination
26 of this issue is not appropriate.
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28

1 **2. ALJ's Disregard of Contradicted Opinion of a Treating Physician**
2 **Without Providing Specific and Legitimate Reasons that Are Based on Substantial**
3 **Evidence in the Record.**

4 Defendant states that the ALJ wrongly rejected the opinion of Dr. Michel. (Dkt.
5 #21). The Court agrees with Defendant that the reasons provided by the ALJ for the
6 rejection of Dr. Michel's opinion were not clear and convincing. See discussion Part
7 IV.B.1. Because the ALJ's reasons for rejecting Dr. Michel's opinion were not clear and
8 convincing, remand for determination of benefits, rather than remand to allow the ALJ to
9 set forth better reasons, is the proper remedy. Orn v. Astrue, 495 F.3d at 640. Therefore
10 remand for a determination of this issue is not appropriate.

11 **3. ALJ's Failure to Consider Some of Plaintiff's Impairments**

12 Defendant states that, while at step two of the five-step sequential evaluation
13 process, the ALJ found that Plaintiff had fibromyalgia, at step four, the ALJ found that
14 "[t]he medical record fails to show that the claimant has ever been diagnosed with
15 fibromyalgia by a rheumatologist [and that] her allegations of pain, fatigue and limitations
16 from fibromyalgia would not require any further reduction in her [RFC]." (AR 31, Dkt.
17 #21). Correspondingly, Defendant argues that the ALJ wrongly failed to consider
18 limitations and restrictions imposed by some of Plaintiff's impairments. (Dkt. 21).
19 Determination of this issue is not necessary because its determination does not affect the
20 Court's ultimate decision. Therefore remand for a determination of this issue is not
21 appropriate.

22 **V. CONCLUSION**

23 Remand for benefits is appropriate "where the record has been developed fully and
24 further administrative proceedings would serve no useful purpose." Benecke v. Barnhart,
25 379 F.3d at 593. Specifically, the district court should credit evidence that was rejected
26 during the administrative process and remand for an immediate award of benefits if (1)
27 the ALJ failed to provide legally sufficient reasons for rejecting the evidence, (2) there
28 are no outstanding issues that must be resolved before a determination of disability can be

1 made, and (3) it is clear from the record that the ALJ would be required to find the
2 claimant disabled were such evidence credited. Id.; Harman v. Apfal, 211 F.3d 1172 (9th
3 Cir. 2000).

4 The record reveals that when Plaintiff's evidence is credited as true, a
5 determination of disability can be made without additional administrative proceedings.
6 Benecke, 379 F.3d at 593. The vocational expert testified that if Plaintiff's testimony is
7 credited as true, the ALJ would be required to find Plaintiff disabled. (AR 633-34).
8 Furthermore, the ALJ herself admitted that if she accepted this testimony, she "would
9 have to find that a conclusion of disabled is appropriate." (AR 633).

10 During the June 20, 2006 hearing, the vocational expert testified that all work
11 would be precluded for an individual with Plaintiff's age, work experience, and
12 educational background, but with the limitations assessed by Dr. General, which were
13 based on Plaintiff's symptom testimony. (AR 199-206). The vocational expert testified
14 that combination of Plaintiff's age, education, work experience, and limitations as
15 assessed by Dr. General "would preclude work." (AR 634). The Court finds that the ALJ
16 improperly rejected Plaintiff's treating physicians' assessments and Plaintiff's testimony
17 regarding the severity of Plaintiff's symptoms and limitations due to his impairments.
18 The ALJ failed to provide specific and legitimate reasons supported by substantial
19 evidence in the record to support his credibility determinations. Accordingly, the Court
20 must credit Plaintiff's testimony as true, and in doing so, the Court finds that Plaintiff is
21 disabled within the meaning of the Social Security Act as of October 15, 2004, the
22 alleged onset date of Plaintiff's disability.

23 VI. SUMMARY

24 The Court finds that the ALJ improperly rejected Plaintiff's treating physicians'
25 assessments and Plaintiff's testimony regarding the severity of Plaintiff's symptoms and
26 limitations due to her impairments. The ALJ failed to provide specific and legitimate
27 reasons supported by substantial evidence in the record to support her credibility
28 determinations. Thus, the Court must credit Plaintiff's testimony as true, and in doing so,

1 the Court finds that Plaintiff is disabled within the meaning of the Social Security Act as
2 of October 31, 2003, the alleged onset date of Plaintiff's disability.

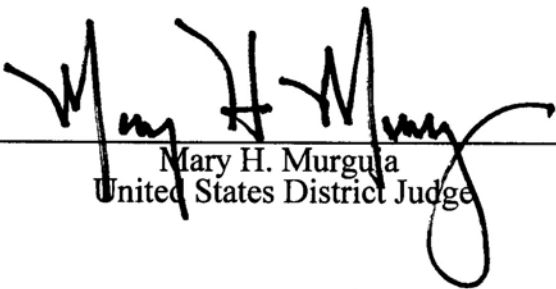
3 **Accordingly,**

4 **IT IS HEREBY ORDERED** that Plaintiff's Motion for Summary Judgment is
5 GRANTED. (Dkt. #11).

6 **IT IS FURTHER ORDERED** that Defendant's cross-motion for summary
7 judgment and requesting the matter to be remanded the Social Security Administration for
8 further administrative proceedings is DENIED. (Dkt. #21).

9 **IT IS FURTHER ORDERED** that this matter be remanded to the Commissioner
10 of Social Security for an award of benefits.

11 DATED this 29th day of June, 2009.

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16 Mary H. Murgula
17 United States District Judge
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